APPEAL NO. 93311

On March 23, 1993, a contested case hearing was held in (city) Texas, with (hearing officer) presiding as the hearing officer. Based on the report of the designated doctor, the hearing officer determined that the appellant (claimant herein) reached maximum medical improvement (MMI) on March 22, 1993, with a four percent whole body impairment. The hearing officer further determined that the claimant had disability since December 3, 1992. The hearing officer ordered the respondent (carrier herein) to pay the claimant temporary income benefits (TIBS) from December 4, 1992 through March 22, 1993, with an "offset" for post injury earnings. The hearing officer also ordered the carrier to pay the claimant 12 weeks of impairment income benefits. The claimant disputes the determination of MMI because he states he is trying to set a date for a second surgical procedure with his treating doctor. The claimant also disputes that part of the hearing officer's order which reduces the rate of TIBS from $385 per week to $119 per week for the period of December 29, 1992 to March 22, 1993 to take into account the claimant's post injury earnings. No response was filed.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant was not represented at the hearing nor was he assisted by a Texas Workers' Compensation Commission (Commission) Ombudsman. He said he was aware that an Ombudsman was available to assist him, but wished to proceed on his own.

The issues at the hearing were: 1) whether the claimant reached MMI; 2) if the claimant reached MMI, what is his impairment rating; and, 3) if the claimant had not reached MMI, did he continue to have disability.

The claimant injured his right elbow in a work-related accident on (date of injury). He worked as an insulator at the time of the accident. He was treated by (Dr. D) who transposed the claimant's right ulnar nerve in an operation on December 20, 1991. No medical reports of Dr. D were in evidence.

On April 22, 1992, the claimant was examined by , (Dr. L) at the request of the carrier. Dr. L wrote that the claimant had full range of right elbow motion, full strength of abduction, and that he had "objectively excellent results" from surgery. Dr. L further stated that the claimant had no sign of a true impairment of a major nature in the hand or forearm, and that he appeared capable of returning to work as an insulator without any specific restrictions. In a Report of Medical Evaluation (TWCC-69), Dr. L certified that the claimant reached MMI on April 22, 1992, with a zero percent whole body impairment rating.

On November 6, 1992, the claimant was examined by (Dr. H) at the request of the carrier. Dr. H noted that flexion in both elbows was normal, that x-rays of the right elbow showed no calcification or abnormalities, and that no further treatment was indicated. Dr.

H further stated that he saw no reason why the claimant could not go back to his usual occupation and that the claimant had enough strength in his right hand to keep himself from falling. The claimant indicated that an insulator's job required climbing. Dr. H mentioned that the claimant told him that he had a third party suit pending and that that was a factor in his not wanting to return to work. In a TWCC- 69 dated December 1, 1992, Dr. H certified that the claimant reached MMI on November 6, 1992, with a zero percent whole body impairment rating.

On February 9, 1993, the claimant and the carrier agreed on , (Dr. T) as the designated doctor. Dr. T examined the claimant on March 22, 1993, and certified that the claimant reached MMI on March 22, 1993, with a four percent whole body impairment rating in a TWCC-69. In a narrative report, Dr. T noted that EMGs were done preoperatively and postoperatively, that the most recent EMG done on March 17, 1993 showed slower nerve conduction velocities of the median and ulnar nerves of the right elbow, but that both [the median and ulnar nerves] were still within normal limits. Dr. T also noted that according to the claimant, the most recent evaluation by Dr. D offered the claimant the "possibility of a second surgical procedure." The claimant testified that he had been examined by Dr. D a few weeks before the hearing. Dr. T found that sensation was intact in all digits and all aspects of the hand to include the ulnar nerve area distribution specifically. No primary pathology was noted in the shoulder, wrist, or hand. Dr. T stated that:

> It is my feeling that at this time, without further surgical treatment, this patient has reached maximum medical improvement. Regarding the question of further surgery, I would state that a second surgery could be attempted, however, I feel that the prognosis for return to unrestricted asymptomatic laboring lifestyle is not present with such surgery.
>
> A second surgical procedure should involve a medial epicondylectomy, re-exploration of the ulnar nerve, and more extensive release both proximally and distally of the nerve itself.
>
> If this patient elects not to proceed with the elective surgical procedure as described to him by his doctor, I would therefore declare him to have reached maximum medical improvement.

Dr. T then set forth his findings regarding the claimant's impairment rating and stated:

> As I have previously stated, I feel this patient does have a significant problem, but that further surgery is unlikely to return him to an active laboring lifestyle. If he elects not to proceed with further surgery, I would therefore recommend that he be enrolled in alternative work retraining through the Texas Rehabilitation Commission and that specifically he avoid repetitive gripping,

grasping, climbing, and/or lifting of objects greater than 20 lbs. with the right dominant upper extremity.

The claimant urged at the hearing that he had not reached MMI because of the possibility of a second surgery on his elbow. He said "I'm probably going to elect to have the surgery, I haven't made up my mind." The carrier urged that the claimant reached MMI on April 22, 1992 per Dr. L's certification. The hearing officer based her determinations of MMI and impairment rating on the report of Dr. T, the designated doctor. She found that the claimant reached MMI on March 22, 1993, with a four percent whole body impairment rating, and that the great weight of the medical evidence was not contrary to the report of the designated doctor.

"MMI" means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Since 104 weeks have not expired from the date income benefits began to accrue for the claimant's (date of injury), injury, we are concerned in this case with the first part of the definition of MMI. "Impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Article 8308-1.03(24). Pursuant to Article 8308-4.25(b), the report of the designated doctor concerning whether the employee has reached MMI has presumptive weight and the Commission must base its determination as to whether the employee has reached MMI on that report unless the great weight of the other medical evidence is tho the contrary. We have previously observed that it is not just equally balancing evidence or a preponderance of evidence that can overcome the presumptive weight given the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report, including that of a treating doctor, is accorded the special presumptive weight given to the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. In regard to impairment rating, Article 8308-4.26(g) provides in pertinent part that, if the parties agree on a designated doctor, the Commission shall adopt the impairment rating made by the designated doctor.

On appeal, the claimant disputes the hearing officer's determination of MMI and refers us to the report of the designated doctor and to patient notes and a medical report from Dr. D. The patient notes and report from Dr. D were not made a part of the record at the hearing. Consequently, they are not considered on appeal. Article 8308-6.42(a)(1) limits our review of the evidence to the record developed at the hearing. *See* Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992. Additionally, we observe that the hearing was held on March 23, 1993, and that Dr. D's patient notes are dated January 6 and March 15, 1993, and his medical report is dated March 17, 1993. Thus, the patient notes and medical report were made before the hearing

and the claimant has provided no explanation for his lack of diligence in bringing the report and notes to light. It has been held that it is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to satisfy the court that the evidence has come to his knowledge since trial, that it was not owing to the want of due diligence that it did not come sooner, that it is not cumulative, and that it is so material that it would probably produce a different result if a new trial were granted. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

In deciding the issue of MMI in this case we look to two recent decisions of the Appeals Panel. In Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993, we affirmed the hearing officer's decision that the employee reached MMI based on the report of the designated doctor. In that case, two doctors said that surgery was needed, but the designated doctor specifically found that surgery would not be effective in treating the employee's complaints. In Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993, we reversed and remanded a determination of MMI which was based on the report of the designated doctor. In that case, the treating doctor stated that the claimant was a surgical candidate; the claimant said he intended to have surgery but wanted the opinion of another doctor for which he had scheduled an appointment; the designated doctor did not give an opinion as to whether surgery would result in further material recovery from or lasting improvement to the employee's injury; and there was no evidence that the claimant did not need surgery. The designated doctor in Appeal No. 93293 had simply stated that "[t]he patient does not desire surgery unless absolutely necessary. Without surgery he has reached MMI at 7% disability." In reversing and remanding the hearing officer's decision, we stated:

> Our decision is limited to the particular facts of this case. We do not take the position that simply because a treating doctor indicates that a claimant is a candidate for surgery that MMI may not be found. Each case must be decided on its own merits and factors such as when the claimant first learned of the need for surgery, the claimant's actions after obtaining that information, the reason for delay, if any, in scheduling surgery, and the opinions of doctors may be evaluated in such cases.

In the instant case, the claimant indicated that he had an examination with his treating doctor a few weeks before the hearing and that it was then that he found out that a second surgery was a possibility. There is nothing in the record to indicate that the claimant was seeking another opinion regarding the second surgery or that surgery had been scheduled. However, the claimant explained that he simply needed more time to consider whether to proceed with the second surgery. In regard to doctors' opinions, Dr. L said the claimant reached MMI and that the first surgery had excellent results; Dr. H said that the claimant had reached MMI and that further treatment was not indicated; and the designated doctor, Dr. T, said that the claimant reached MMI and also opined that a second surgery could be

attempted but that "the prognosis for return to unrestricted asymptomatic laboring lifestyle is not present with such surgery" and that "further surgery is unlikely to return him to an active laboring lifestyle." Having reviewed the record, we conclude that the hearing officer's determination that the claimant reached MMI on March 22, 1993, based on the report of the designated doctor is sufficiently supported by the evidence of record, and further conclude that the hearing officer's determination that the great weight of the other medical evidence is not contrary to the report of the designated doctor is supported by the evidence. This case is distinguishable from Appeal No. 93293 in that in this case the designated doctor rendered an opinion regarding the likelihood of improvement from a second surgery and there are other medical opinions that the first surgery had excellent results and that further treatment was not indicated.

The second issue on appeal concerns the hearing officer's order which reduces the claimant's TIBS for post injury earnings for the period of December 29, 1992 to March 22, 1993. The hearing officer found that the claimant had disability since December 3, 1992, but ordered that his TIBS for the period December 29th to March 22nd be reduced from $385 per week to $119 per week to take into account post injury earnings. Article 8308-4.23(c) provides that "[e]xcept as provided in Subsection (d) of this section, temporary income benefits are payable at the rate of 70 percent of the difference between the employee's average weekly wage and the employee's weekly earnings after the injury, not to exceed the maximum weekly benefit under Section 4.11 of this Act or to be less than the minimum weekly benefit under Section 4.12 of this Act."

The carrier represented at the hearing that the claimant had been paid TIBS from (date of injury) to December 3, 1992. The claimant testified that although his treating doctor never released him to return to work, he went to work for Atlas Air Conditioning (employer B) as an insulator's helper on December 29, 1992 at $9.50 per hour and that he worked a forty hour week which results in a $380 weekly wage. In a previous decision issued August 11, 1992, which was not appealed, the hearing officer determined that the claimant's average weekly wage at the time of his injury was $550. The claimant said he worked for employer B until he and the rest of the crew were laid off for about one week in mid-February 1993, and that he then returned to work for employer B until the beginning of March 1993. He said he had not worked for anyone since the beginning of March 1993. However, the claimant gave conflicting testimony when he testified that he did not stop working for employer B until he got the results of the March 17, 1993, EMG. In addition, in answers to interrogatories sent to the carrier on March 9, 1993, the claimant said that he was still employed by employer B, and in an investigative report dated March 9, 1993, which was in evidence, an investigator for the carrier wrote that he had contacted employer B and found that the claimant was currently working for employer B and had never been laid off since being hired in December 1992.

The hearing officer is the sole judge of the weight and credibility to be given to the

evidence. Article 8308-6.34(e). When presented with conflicting evidence, the hearing officer may resolve inconsistencies in the testimony of any witness, and believe one witness and disbelieve others. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). Given the conflicting evidence as to the claimant's period of post injury employment, we cannot conclude that the hearing officer erred in ordering that the claimant be paid TIBS at the rate of $119 after December 28, 1992 ($550 AWW - $380 weekly post injury earnings $\times$ 70% = $119 TIBS). Of course, when the claimant reached MMI on March 22, 1993, his entitlement to TIBS ceased. Article 8308-4.23(b).

The decision and order of the hearing officer are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge